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No. 91-1310

In The

Supreme Court of the United States

October Term, 1991

In the Matter of
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY

NPM GROUP, INC.
(formerly known as WILMAT HOLDINGS, INC.
as successor-in-interest to
Central Jersey Industries, Inc.),

Petitioner,

v.

Joseph Benedetto, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Was not the United States Court of Appeals for the Third Circuit correct when it held that a Consummation Order entered in a railroad reorganization under Section 77 of the now repealed Bankruptcy Act did not bar a claim against the reorganized company under the Federal Employers' Liability Act for an injury that preceded the Consummation Order when the injured employee could not reasonably have known until after the Consummation Order that his injury was caused by the conditions of his railroad employment?

DESIGNATION OF CORPORATE RELATIONSHIPS

Consolidated Rail Corporation, the only respondent that is a corporation, is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railway Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; Railroad Association Insurance, Ltd.; Trailer Train Company; and Transportation Data Xchange. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. The opinion is reported at 950 F.2d 887 (3d Cir. 1991).

COUNTER-STATEMENT OF THE CASE

In 1967, The Central Railroad Company of New Jersey ("CNJ") commenced in the United States District Court for the District of New Jersey what would become a twelve-year reorganization proceeding under section 77 of the now-repealed Bankruptcy Act,[1] supplemented by the Regional Rail Reorganization Act (the "Rail Act").[2] On April 1, 1976, pursuant to the Final System Plan developed under the Rail Act,[3] CNJ transferred its rail assets to other railroads, including Consolidated Rail Corporation ("Conrail"), and many of CNJ's railroad employees became Conrail employees. On September 14, 1979 (the "Consummation Date"), CNJ's plan of reorganization was consummated, CNJ was released and discharged from all claims then existing against it, and the

[1] The Bankruptcy Act of 1898, as amended, § 77, former 11 U.S.C. § 205. The Bankruptcy Act was replaced prospectively by the Bankruptcy Reform Act of 1978, the current Bankruptcy Code, which went into effect on October 1, 1979.

[2] Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701-97m.

[3] *See* 45 U.S.C. §§ 716-18.

district court enjoined the pursuit of such discharged claims against the reorganized company or its successors and assigns.[4]

The reorganized CNJ was renamed Central Jersey Industries, Inc. Central Jersey Industries, Inc., later merged into CJI Industries, Inc., which later became Triangle Industries, Inc. Triangle's liability to former CNJ employees was assumed by Wilmat Holdings, Inc., which apparently adopted the name of NPM Group, Inc., after the Third Circuit issued the opinion now under consideration. (Because of its many names over the years, the reorganized company, which the Third Circuit referred to as "Wilmat," is referred to as Petitioner in this brief.)

In 1984, Petitioner asked the United States District Court for the District of New Jersey, which had been its bankruptcy reorganization court, to enjoin several former CNJ employees from pursuing claims under the Federal Employers' Liability ACT ("FELA")[5] for injuries caused by their exposure to asbestos during their CNJ employment. Although the district court initially enjoined the pursuit of such FELA claims against Petitioner, the United States Court of Appeals for the Third Circuit reversed in *Schweitzer v. Consolidated Rail Corporation*,[6] holding that former CNJ employees who were exposed to asbestos while working for CNJ, but who did not manifest symptoms of asbestos-related disease until after the

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[4] *See* App. at 29a-31a.

[5] 45 U.S.C. §§ 51-60.

[6] 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

CNJ reorganization's Consummation Date, had not had claims that were dischargeable in the CNJ bankruptcy reorganization.

Following the Third Circuit's decision in *Schweitzer*, the district court held that former CNJ employees who were exposed to asbestos during their CNJ railroad employment, but whose asbestos-related injuries became manifest after CNJ's Consummation Date, could pursue FELA claims directly against Petitioner as the reorganized company and did not need to obtain approval from Petitioner's reorganization court to institute such suits. The United States Court of Appeals for the Third Circuit affirmed the district court's ruling in *Zulkowski v. Consolidated Rail Corporation*.[7]

On December 21, 1990, Petitioner yet again asked its reorganization court to enjoin several former CNJ employees from pursuing FELA claims they had asserted against Petitioner. Petitioner contended that these former employees were seeking to recover for leukemia and hearing loss injuries that were manifest before the CNJ reorganization's Consummation Date and, therefore, that their claims were dischargeable and discharged in the CNJ reorganization proceeding. In seeking the injunction, Petitioner contended that the former employees had claims that were dischargeable under section 77 of the Bankruptcy Act *even if* the employees neither knew nor could have known before the 1979 Consummation Date that their injuries were caused by the conditions of their CNJ railroad employment.

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[7] 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988).

Petitioner's reorganization court denied the application for injunction, adopting the analysis made by the United States District Court for the Eastern District of Pennsylvania in *Wyne v. CSX Transportation Co.*[8] In *Wyne*, the court had held that "a 'claimant must know or have reason to know of his condition and the cause thereof' " in order for an FELA claim to exist and be dischargeable under the Bankruptcy Act. The reorganization court below held that Petitioner did not establish that respondent Joseph Benedetto should have known the cause of his leukemia before the Consummation Date and did not demonstrate that Richard Anglemeyer and the other remaining individual respondents should have known the cause of their hearing loss injuries before the Consummation Date. The reorganization court also held that the courts in which the individual respondents had filed their FELA claims should determine whether those claims were barred by applicable statutes of limitations. The court recognized that there could be inconsistent rulings if it reached the statute of limitations issue because the individual respondents had also named Conrail, their post-CNJ railroad employer, as a defendant in the underlying FELA actions and Conrail had then asserted cross-claims against Petitioner for contribution or indemnity.

The United States Court of Appeals for the Third Circuit affirmed the refusal of Petitioner's reorganization court to issue an injunction.[9] After analyzing this Court's

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[8] No. 88-9061 (E.D. Pa. July 31, 1989) (1989 WESTLAW 89085).

[9] *In re The Central R.R. of N.J.*, 950 F.2d 887 (3d Cir. 1991).

seminal FELA opinion in *Urie v. Thompson*[10], as well as subsequent district court and Third Circuit opinions applying the precepts set forth in *Urie*, a united Third Circuit panel, seeking "an appropriate accommodation of the federal interests at play in FELA and in bankruptcy," held that "the appropriate legal rule is that a claim [for purposes of the Bankruptcy Act] is not manifest until the claimant discovers, or a reasonable person would have discovered, his injury and knows, or has reason to know, the cause thereof."[11]

REASONS FOR DENYING THE PETITION

A. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE FAR-RANGING QUESTION PETITIONER PRESENTS BECAUSE THIS CASE INVOLVES ONLY FELA CLAIMS AND A RAILROAD REORGANIZATION CONDUCTED UNDER A REPEALED BANKRUPTCY STATUTE.

Petitioner urges this Court to grant its petition for a writ of certiorari to address "an issue of continuing importance to reorganizations under the present [Bankruptcy Code] statute."[12] However, even though Petitioner has drafted a question that refers to "tort claims,"

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[10] 337 U.S. 163 (1949).

[11] 950 F.2d at 892 (App. at 14a).

[12] Petition, at 11.

"bankruptcy statutes," and "key objectives in bankruptcy reorganization,"[13] this case does not present a far-ranging issue. The Third Circuit decision did not analyze tort claims and bankruptcy law in general. Rather, it dealt with the interplay between the FELA, a statute that applies to railroad workers, and the Bankruptcy Act's section 77, a section of a repealed statute covering only railroad reorganizations.

Petitioner, when it operated a railroad as CNJ, filed for reorganization under section 77 of the Bankruptcy Act. Section 77 of the Bankruptcy Act, when in effect, applied only to operating railroads, and section 77, for purposes of Petitioner's reorganization, was modified and supplemented by provisions of the Rail Act, which applied only to certain reorganizing railroads in the Northeast and Midwest.

The fact that this case arises out of the repealed section 77 is important. Section 77 had a materially different definition of "claim" than that contained in the current Bankruptcy Code. Section 77(b) of the Bankruptcy Act, defined "claims" as "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." While that definition of "claim" was broad, it did not include a critical concept of current bankruptcy law. The Bankruptcy Code now incorporates within the definition of "claim" a "right to an equitable remedy for breach of performance if such breach gives

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[13] Petition, at i.

rise to a right of payment . . . "[14] For the most part, the decisions that Petitioner cites that have addressed the dischargeability of claims in bankruptcy proceedings interpret that Bankruptcy Code definition of a claim.[15] While Petitioner alleges that the holding in this case conflicts with those decisions, the various courts in those decisions and the Third Circuit in this case were interpreting significantly different statutes.

B. THE COURT OF APPEALS DECISION IS CORRECT, CONSISTENT WITH BANKRUPTCY POLICY, AND NOT IN CONFLICT WITH DECISIONS OF ANY OTHER COURT.

That finality and a fresh start are the desired and desirable ends of the reorganization process is virtually a cliché in bankruptcy jurisprudence. It is common for courts to state, as the Third Circuit recently did in connection with a dispute involving another section 77 Bankruptcy Act railroad reorganization that "in the context of bankruptcy 'the need for finality and certainty is especially acute.' "[16] However, the Third Circuit has recognized, as Petitioner has not, that such a sweeping statement does not resolve the question presented here. Examination of the cases on which Petitioner relies to

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[14] 11 U.S.C. § 101(5).

[15] *See* discussion of cases at pages 10-13, *infra*.

[16] *In re Penn Central Transp. Co.*, 944 F.2d 164, 166-167 (3d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3598 (U.S. March 2, 1992) (No. 91-761) (citations omitted).

argue that the Third Circuit's decision "frustrates the finality and fresh start objectives of bankruptcy reorganization"[17] shows that those cases either support or are irrelevant to the Third Circuit's holding that the individual Respondents can pursue FELA claims against CJI.

As an initial matter, it must be noted that Petitioner's discussion of the Third Circuit's decision in *In re M. Frenville Co.*[18] is both inaccurate and puzzling. The Third Circuit did not cite that case in its opinion, and that case did not hold, as petitioner states,[19] that a "claim" for purposes of the Bankruptcy Code always equals an accrued cause of action. The *Frenville* decision and comments about that decision are irrelevant here.

To decide this case, the Third Circuit relied primarily on its prior decisions in *Schweitzer v. Consolidated Rail Corporation*[20] and *Zulkowski v. Consolidated Rail Corporation*,[21] which involved both the Bankruptcy Act and the FELA, and on its opinion in *Kichline v. Consolidated Rail Corporation*,[22] which interpreted the FELA's statute of limitations. In *Schweitzer* and *Zulkowski*, the Third Circuit held that railroad workers who knew they had been exposed to asbestos did not have claims at the time of a

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[17] Petition, at 17.

[18] 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

[19] Petition, at 23.

[20] 758 F.2d 936 (3d Cir.), *cert denied*, 474 U.S. 864 (1985).

[21] 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988).

[22] 800 F.2d 356 (3d Cir. 1986).

railroad's reorganization under section 77 of the Bankruptcy Act, as supplemented by the Rail Act, because the workers had no manifest asbestos-related injuries and a compensable claim does not arise under the FELA until a railroad worker has a manifest injury.[23] In *Kichline*, the Third Circuit held that an FELA claim accrues for purposes of the statute of limitations "when the employee becomes aware of his disease and its cause."[24] In this case, the Third Circuit has held that a railroad worker's FELA claim for a job-related injury does not constitute a claim for purposes of the Bankruptcy Act until the worker with a manifest injury discovers, or reasonably could have discovered, his injury and its cause.[25]

As the Third Circuit explained, for an individual respondent's claim to have existed and been dischargeable in Petitioner's reorganization proceeding, there must have then been an existing legal relationship between that respondent and Petitioner that was relevant to the legal basis for Respondent's claim.[26] The Third Circuit has appropriately held here that FELA claims for work-related injury are outside the Bankruptcy Act's section 77 definition of claim unless a reasonable person should have known of his injury and its cause because, before then, there was no legal basis upon which either an

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[23] *Schweitzer*, 758 F.2d at 942; *Zulkowski*, 852 F.2d at 76.

[24] 800 F.2d at 358.

[25] 950 F.2d at 892 (App. at 14a).

[26] *Id. See also Schweitzer*, 758 F.2d at 943.

existing or contingent claim could be premised.[27] The Third Circuit also recognized that a contrary holding permitting the discharge of claims about which the individual respondents could have no effective awareness would raise serious constitutional questions.[28]

The cases Petitioner cites do not, in any way, undermine the propriety of the Third Circuit's decision.

First, Petitioner cites various cases involving environmental claims asserted in reorganizations governed by the Bankruptcy Code. For example, Petitioner cites *In re Chateaugay Corporation*,[29] in which the Second Circuit held that under the Bankruptcy Code the United States had dischargeable claims pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for releases of hazardous substances that occurred before the debtor's filing of a reorganization petition, even though the United States had not then incurred any response costs in connection with the releases.[30] Petitioner also cites *In re Jensen*,[31] in which the Ninth Circuit's Appellate Bankruptcy Panel took a similar view concerning the Bankruptcy Code, finding that the State of California's claim for environmental clean-up costs had been discharged.[32]

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[27] 950 F.2d at 892 (App. at 14a).

[28] *Id.* at 892 n.5 (App. at 15a, n.5).

[29] 944 F.2d 997 (1991).

[30] *Id.* at 999, 1005.

[31] 127 B.R. 27 (Bankr. 9th Cir. 1991).

[32] *Id.* at 33.

What Petitioner ignores is the holding in the environmental case that is relevant here – the Third Circuit's 1991 decision permitting CERCLA claims to be pursued against another reorganized railroad, the Penn Central Corporation, where there had been a release of hazardous substances before Penn Central's reorganization had been completed, but CERCLA, the statutory basis for the claims, had not yet been enacted. In that case, as here, the necessary legal *and* factual bases for existing or contingent claims were not present before the reorganization's Consummation Date and, therefore, the claims had not been dischargeable.[33]

Second, Petitioner cites various cases involving non-FELA personal injury claims. For example, Petitioner cites *Grady v. A.H. Robins Co.*,[34] a case in which the Fourth Circuit held that future claims for injuries that might yet be caused by the debtor's product were "claims" for purposes of enforcing the automatic stay provision of the Bankruptcy Code but explicitly did *not* decide whether such future product liability claims were *dischargeable* in a reorganization proceeding.[35] As another example, Petitioner cites *In re Amatex Corporation*,[36] in which the Third Circuit appointed a *guardian ad litem* to represent future claimants but refused to decide whether future claims were defined as "claims" under the Bankruptcy Code.[37]

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[33] *See In re Penn Central Transp. Co.*, 944 F.2d at 167-68.

[34] 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988).

[35] *Id.* at 203.

[36] 755 F.2d 1034 (3d Cir. 1985).

[37] *Id.* at 1041-43.

(There was no provision for future claims in Petitioner's 1979 reorganization plan.) Other cases that Petitioner cites also address the dischargeability of claims under the Bankruptcy Code and are otherwise inapplicable.[38]

Finally, Petitioner discusses cases involving contingent contract claims that are readily distinguishable from claims such as the FELA claims at issue here. The Petitioner cites *In re Clinton Centrifuge, Inc.*,[39] *In re THC Financial Corporation*,[40] and *In Re Remington Rand Corporation*[41], which deal with contingent contractual claims of the sort that courts uniformly have recognized as dischargeable under the Bankruptcy Act and the Bankruptcy Code, regardless of whether a cause of action for breach

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[38] *See In re UNR Indus., Inc.*, 725 F.2d 1111 (7th Cir. 1984) (proceeding under Bankruptcy Code, no finding of dischargeability, and appeal dismissed for lack of jurisdiction); *In re Black*, 70 B.R. 645 (Bankr. D. Utah 1986) (interpreting Bankruptcy Code and its automatic stay provisions); *In re A. H. Robins Co.*, 63 B.R. 986, 987 (Bankr. E.D. Va. 1986) (interpreting Bankruptcy Code and its automatic stay provisions) *aff'd*, 839 F.2d 198, *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988); *In re Edge*, 60 B.R. 690, 691-92 (Bankr. M.D. Tenn. 1986) (interpreting Bankruptcy Code in the context of an individual's bankruptcy proceeding); *In re Johns-Manville Corp.*, 57 B.R. 680, 681 (Bankr. S.D.N.Y. 1986) (interpreting Bankruptcy Code and its automatic stay provisions); *In re Baldwin-United Corp.*, 48 B.R. 901, 902 (Bankr. D. Ohio 1986) (proceeding under automatic stay provision of Bankruptcy Code); *In re UNR Indus., Inc.*, 46 B.R. 671, (Bankr. N.D. Ill. 1985) (proceeding under Bankruptcy Code and no finding of dischargeability).

[39] 81 B.R. 844 (Bankr. E.D. Pa. 1988)

[40] 686 F.2d 799 (9th Cir. 1982).

[41] 836 F.2d 825 (3d Cir. 1988).

of contract has yet matured. The Third Circuit in *In re Remington Rand* found that a contract established a legal relationship that gave the United States a claim for purposes of a bankruptcy proceeding even though the United States had not yet completed the procedures necessary to the institution of a law suit.[42] The Court in *In re THC Financial Corporation* held that attornment and indemnification agreements gave a party a claim, albeit contingent, in a surety's bankruptcy proceeding under the Bankruptcy Act.[43] Similarly, the Court in *In re Clinton Centrifuge, Inc.*, held that a contingent contractual claim is a "claim" for the purposes of the Bankruptcy Code.[44]

In short, the Third Circuit in *Schweitzer, Zulkowski* and the instant case is the only court of appeals that has decided when an FELA claim against a reorganized railroad is dischargeable under the Bankruptcy Act, and the Third Circuit's decisions are consistent with the policies underlying the bankruptcy statute. Petitioner is simply incorrect when it asserts that the Third Circuit's decision here either conflicts with decisions of other courts or is contrary to bankruptcy law policy.

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[42] *Id.* at 831-33. *See also Schweitzer*, 758 F.2d at 942-43 (under Bankruptcy Act, guaranty agreement established legal relationship that gave landlord claim in debtor-guarantor's reorganization although no default had occurred upon lease for which debtor was guarantor) (explaining *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir. 1939)).

[43] 686 F.2d at 802-05.

[44] 81 B.R. at 846-48 (explaining Third Circuit decisions in *Frenville, Schweitzer,* and *Remington Rand*).

C. THERE IS NO EQUITABLE REASON FOR GRANTING PETITIONER'S REQUEST FOR A WRIT

Petitioner maintains that it is inequitable to permit former CNJ employees to maintain FELA claims against Petitioner because they could receive "unwarranted preferential treatment."[45] What Petitioner recognizes only in an oblique fashion is the crucial fact that the individual respondents involved here are not obtaining any "preferential treatment."

Under the Rail Act, all FELA claims of employees of reorganizing railroads were given priority and paid in full. Conrail was made initially responsible for paying the claims, and the railroads in reorganization, such as CNJ, then reimbursed Conrail.[46] FELA claims thus were guaranteed priority payment in railroad reorganizations and the only effect of their assertion now is that Petitioner has been and will be able to delay payment until such time as the individual respondents obtain judgments against Petitioner, something that cannot occur until at least 13 years after Petitioner's reorganization was completed. Therefore, it cannot be said that the individual respondents are somehow obtaining any unfair advantage.

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[45] Petition, at 21-22.

[46] *See* 45 U.S.C. §§ 721(h), 797h(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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